No. 85-1963

IN THE

# Supreme Court Of The United States

**October Term, 1985**

TYLER PIPE INDUSTRIES, INC.,
*Appellant*

*vs.*

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
*Appellee*

**On Appeal from the Supreme Court of Washington**

## REPLY BRIEF OF APPELLANT

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February 6, 1987

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## SUMMARY OF ARGUMENT

The B&O tax is unconstitutional for any one of the following reasons:

(i) Tyler Pipe's activities in Washington were too minimal to constitute nexus.

(ii) The B&O tax discriminates against Tyler Pipe, because it allows a tax exemption for local manufacturers only.

(iii) The tax is not apportioned, because (A) in the tax base Washington recognizes three elements—mining, manufacturing and sales—but fails to reduce the tax when one or more of those elements is conducted out-of-state, and further

because (B) Washington taxes one element—sales—without consideration of what portion of the sales activities were performed out-of-state.

(iv) There is no relation of the tax to Washington services received by Tyler Pipe, because there are no services received.

(v) The tax is not rationally related to the few Tyler Pipe activities in Washington.

## I. WASHINGTON MAY NOT IMPOSE ITS B&O TAX UPON TYLER PIPE, BECAUSE WASHINGTON MAKES NO CASE FOR MINIMAL CONNECTION OR SUBSTANTIAL NEXUS.

### A. Tyler Pipe's catalog operation does not satisfy the nexus standards.

Washington asserts that Tyler Pipe has sufficient nexus in Washington by reason of (i) sales solicitation and (ii) market maintenance. Wash. Br. 39-40. The few activities cited by Washington are nothing more than order solicitation, and do not account for the extensive selling activities performed by Tyler Pipe in Texas. Following are the principal facts upon which the nexus question involving the DWV Division depends:

A. *Activities Performed by Ashe & Jones in Washington:*

1. Some sales solicitation.[1]

[1]The uncontradicted testimony was that the market for Tyler Pipe products is primarily a national one, that the advertising and the contacts with customers are usually made on a national level, that Tyler Pipe is nationally known in the industry, that some of Tyler Pipe's products are unique, and that Tyler Pipe products have a national reputation for high quality. J.A. 24-28, 29-32, 42-44, 59, 66-67, 73-76, 79-80, 96, 105. None of these activities were performed by or attributable to Ashe & Jones. Id.

Other non-Washington sales activities and sources of information used by Tyler Pipe to develop its markets and sales that were specifically

*(footnote continued on next page)*



2. Market information of a casual nature (gossip).[2]

B. *Activities Performed by Tyler Pipe in Washington:*

1. Rare trips of Tyler Pipe employees to Washington.[3]

C. *Services Performed by Tyler Pipe not in Washington:*

1. Preparation and distribution of advertising.
2. Extensive market development.
3. Maintenance of inventory.
4. Investigation of credit and acceptance of orders.
5. Delivery of goods by common carrier.
6. Handling of complaints, and replacement of defective parts.

identified as relevant to Washington sales were international, national and regional trade shows and exhibitions, contractors' conventions, trade magazines, industry membership organizations, Tyler Pipe's own sales experiences, and, most importantly, direct telephone conversations with Tyler Pipe's customers (and potential customers). J.A. 25-26, 27-28, 42-43, 51-52, 68-69, 73, 75.

Moreover, the Utility Division made many sales and has even increased its market share in those parts of the country where it utilizes no sales representatives or factory salesmen, J.A. 73-75, 78-79, which suggests either that there are many sources of local information or that local information is not important to the making of sales. Similarly, the DWV Division made international sales despite the fact that it has no overseas representation, J.A. 44, and competitors of Tyler Pipe made sales in Washington without any in-state sales representatives, J.A. 82-84.

[2]Ashe & Jones was *not* making consumer surveys, conducting market research, running product tests, investigating potential customers, drafting reports or analyses, nor doing anything even remotely approaching market analysis, but was merely and occasionally passing on to Tyler Pipe information that came its way. J.A. 49-52, 57, 68-69, 76, 87-89, 90, 91, 95, 104, 120-121, 147-148, 152-156. The information was not even recorded by Tyler Pipe. J.A. 51, 57.

[3]Only ten such trips to Washington were made over the 57-month period at issue, including two for the Utility Division (J.A. 65-66), one to attend a regional trade show and one or more for the Wade Division. Interrog. 12-2(c), Exhibit 14.

7. Collections.
8. Financing inventory and receivables.

See Tyler Pipe Br. 3-7; and notes 1 and 2 above.

Washington's statement on pages 37-38 of its brief that in-state solicitation "alone" creates nexus is incorrect. The case Washington cites, *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959), involved out-of-state vendors who maintained employees and offices, plus in one case automobiles, and in the other inventory, in-state. *Id.,* 358 U.S. at 454, 455, 465.

Furthermore, Washington purports to place Tyler Pipe in the taxable category 2 of *Norton Co. v. Illinois,* 340 U.S. 534 (1951), rather than in the nontaxable category 3 of *Norton* where Tyler Pipe belongs (see Tyler P. Br. 13), on the ground that the tax was upheld in *Norton* where Norton's in-state office either *received* the orders or distributed the goods. Wash. Br. 40, citing 340 U.S. at 538. The balance of the paragraph, which Washington failed to quote, makes clear that the orders in category 2 were not merely received, but were *generated* by the Illinois office for products not among the 3,000 Norton items in Norton's local store.[4] There is no evidence that Ashe & Jones had inventory or a store. See J.A. 97. All Tyler Pipe orders were out of a catalog, all utility orders went directly to Tyler Pipe, and Ashe & Jones telephoned the orders it "received" into Tyler Pipe where the order was actually written up. J.A. 96, 32. If the Court in *Norton* meant "received" to mean nothing more than to serve as a conduit, as Washington asserts, then the Court would have been overruling the solicitation cases. But the Court stated, "[Norton] could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce. . . . " 340 U.S. at 538. Tyler Pipe did just that.

[4]See *Norton Co. v. Department of Revenue* 405 Ill. 314, 90 N.E.2d 737 (1950), where the court found that Norton's activities fell within the category of cases in which orders were completed in state, and distinguished cases where in-state activities involved solicitation only.



Ashe & Jones was an order taker, or more specifically an order transmitter, for Tyler Pipe goods. J.A. 96, 141. Ashe & Jones and the customers had catalogs from which a customer could select the Tyler Pipe products the customer needed. J.A. 29-30, 34, 43, 66-67, 97. Either Ashe & Jones or the wholesaler could telephone the order to Tyler Texas for acceptance and processing.[5] Tyler Pipe wrote up the order. J.A. 32. The product was shipped F.O.B. Tyler, Texas at the customer's risk. Exhibit 43; J.A. 158. *See National Bellas Hess, Inc. v. Dept. of Revenue,* 386 U.S. 753 (1967).

Tyler Pipe products are bought, not sold. See Exhibit 45, J.A. 157. Customers for plumbing products were builders and plumbing supply contractors, who purchased Tyler Pipe's products only because they were required in a building that was being constructed or to replace leaking pipe. Ashe & Jones did not need to convince a potential customer that he needed pipe, and could not convince a prospective customer to purchase pipe if it was not needed.

*Standard Pressed Steel Co. v. Washington,* 419 U.S. 560 (1975), upon which Washington places conclusive reliance, is distinguishable because the taxpayer in that case had only one customer in Washington, the Boeing Company, and the taxpayer employed an engineer, Martinson, as a full-time local employee to maintain the customer relationship by performing product design and testing functions. The Court summarized his activities:

> [T]he activities of Martinson were necessary to appellant in making it aware of which products Boeing might use, in obtaining the engineering design of those products, in securing the testing of sample products to quality them for sale to Boeing, in resolving problems of their use after receipt by Boeing, in obtaining and retaining good will and rapport with Boeing personnel, and in keeping the invoicing person-

[5]Orders for 44.96% (including 100% of the Utility Division Orders) of Tyler Pipe's sales did not even go through Ashe & Jones, but went directly from the customer to Tyler Pipe. J.A. 69-72, 162.

> nel of appellant up to date on Boeing's list of purchasing specialists or control buyers.

419 U.S. at 561. The seller frequently sent other employees into the state to assist Martinson. 419 U.S. at 561. Martinson & the other employees were not simply soliciting sales. They were integrally involved in the production process from design to testing. Boeing was not ordering stock parts from a catalog, as were Tyler Pipe customers. See Exhibit 45, J.A. 157.

Tyler Pipe's sales representatives were soliciting sales, nothing more. Washington's sweeping statement that Ashe & Jones provided "virtually all" of the "local" market information obtained by Tyler Pipe (Wash. Br. 6.) is patently inaccurate,[6] and tendentious.

The presence of Tyler Pipe in Washington through Ashe & Jones is far less than was the presence of Norton in nontaxable category 3 (Tyler P. Br., p. 12-13), and is gossamer compared to the presence of Standard Pressed Steel through Martinson.

### B. Washington's position on the independent contractor issue is a strawman argument.

The scant solicitation by Ashe & Jones was insufficient to constitute adequate nexus for Tyler Pipe regardless of whether the solicitation was performed by Ashe & Jones or directly by Tyler Pipe. Tyler P. Br. 11-13, and see above. The fact that the activities relied upon by Washington to establish nexus were performed by an independent contractor is relevant only because (1) by misstating the issue Washington seeks to distract the Court from the

[6]The same information was obtained by Tyler Pipe through customers and trade shows. J.A. 68-69. The telephone conversations between Ashe & Jones employees and Tyler Pipe employees were nothing more than solicitors' gossip (J.A. 99); they generated no reports nor analyses; their only importance was that the information was "probably subliminally computed into someone's mind." J.A. 51. *See* n. 1 and 2, above.



inadequacy of nexus in this case, and (2) the activities of Ashe & Jones were primarily for its own account, and thus subtract from the scant evidence Washington relies upon.

Washington mistakenly poses the nexus question in terms of whether Tyler Pipe can avoid nexus through utilization of an independent contractor rather than an employee. Wash. Br. i (4); Amici Nat'l Gov. Assn. et al. Br. i (3). Washington then states that the difference between employees and independent contractors is an "artificial distinction" (Wash. Br. 42),[7] citing *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960). First, Tyler Pipe has not asserted that it can avoid nexus through utilization of an independent contractor. Second, in *Scripto,* the Court did not enumerate a sweeping rule of law regarding independent contractors, but stated:

> The test is simply the nature and extent of the activities of the appellant [Scripto] in Florida.[8]

[7]The distinction between employees and independent contractors has a long history. See Labatt, Commentaries on the law of Master and Servant, 2d Ed. (1913) (eight volumes). Important congressional enactments are dependent upon the distinction. See, e.g., Section 530 of the Revenue Act of 1978, P.L. 95-6, which prohibited the Internal Revenue Service from questioning the status of certain workers as non-employees, and Section 1706 of the Tax Reform Act of 1986, P.L. 99-514, which lifts that ban on computer programmers and other technical employees; *NLRB v. United Insurance Company of America,* 390 U.S. 254 (1968), where the Court applied general agency principles in distinguishing between employees and independent contractors under the National Labor Relations Act; *Spirides v. Reinhardt,* 613 F.2d 826 (D.C. Cir. 1979), where the Court recognized that independent contractors were not (as were employees) covered by Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972; and the Federal Interstate Income Tax Act, 15 U.S.C. §§ 381 to 384.

[8]*Scripto* is also distinguishable, because *Scripto* involved only the issue of whether there was sufficient presence to justify requiring an out-of-state person "to collect" a use tax imposed upon in-state buyers, not to pay a tax, and the out-of-state person was reimbursed for those services that were required by the State. The Washington B&O tax, by its

*(Footnote continued on following page)*

Washington thus makes an erroneous factual assumption, states an erroneous rule of law, and, not surprisingly, reaches the erroneous conclusion that there is nexus in this case.

Tyler Pipe asserts only that the activities of an independent contractor must be analyzed to determine what portion of a local independent contractor's activities is his, and what portion is the out-of-state supplier's, to determine whether an out-of-state person has adequate presence to constitute nexus.[9] See Tyler P. Br. 10 *et seq.* and A-4 *et seq.*

Ashe & Jones has been in business longer than Tyler Pipe. J.A. 95, 23-24. Ashe & Jones maintained an office from which it solicited for Ashe & Jones' six or seven suppliers. J.A. 100, 109. This activity constituted Ashe & Jones' presence, not Tyler Pipe's presence, in Washington. The customers were those of Ashe & Jones. See J.A. 106, 109. If Ashe & Jones were to terminate its relationship with Tyler Pipe, Ashe & Jones would still have its place of business, and plumbing supply customers who

*(Footnote continued from previous page)*
express terms, does not fall upon the Washington buyer, but upon the out-of-state seller. R.C.W. 82.04.500, J.S. G-5. The Court has distinguished between taxes whose burden falls upon interstate sellers and those whose burden falls upon local buyers, holding that the former must satisfy more rigorous Constitutional standards than the latter. Cf. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (holding that a sales tax falling upon an interstate seller was unconstitutional under the Commerce Clause) with *General Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335 (1944) (holding that a use tax falling upon the local buyer was constitutional under the Commerce Clause); *also, Norton, supra* at 537. The Court has established lower standards for imposition of the duty to collect use taxes because such taxes do not run the risk of double taxation, the determination of the taxability of a sale is "self-evident", and "the sole burden imposed upon the out-of-state seller . . . is the administrative one of collecting [the tax]." *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 558 (1977).

[9]The Court's treatment of this issue will be important in its effect on the franchise industry, such as fast-food restaurants, and on tiny manufacturers who market through national distributors, such as electronics distributors.



appeared at Ashe & Jones' office would simply have been handed a new and different catalog for DWV products.

Ashe & Jones had 3.5 salespersons representing six or seven manufacturers. J.A. 100, 102, 109. Even if the sales people spent 100% of the time on sales (but see J.A. 103), and Tyler Pipe received a pro rata share of their time, which seems doubtful for a catalog operation, then the time allocated to Tyler Pipe would have been the equivalent of only one-half of a sales person.

Ashe & Jones was compensated only through commissions on sales actually made. J.A. 18. Contrary to Washington's statement (Wash. Br. 5), employees working in the sales department of Tyler Pipe were paid salaries, plus commissions. They also participated in Tyler Pipe's employee benefit plans.[10] The commission arrangement with Ashe & Jones was designed to generate sales, nothing more. Ashe & Jones was not paid to do marketing.

Tyler Pipe could not *tell* Ashe & Jones to do anything.[11] Tyler Pipe's employees are required to do whatever they are told to do within the general scope of their employment (Restatement, Second, Agency, Ch. 13, § 385), which included a long list of items involved in sales and marketing that Ashe & Jones was not paid to do. See p. 2-4, above.[12]

[10]Unlike the sales representatives, the employees of Tyler Pipe are subsidized by Tyler Pipe in their cost of doing business, are compensated by Tyler Pipe on a mixed salary and commission basis, are provided insurance benefits by Tyler Pipe, and are under the immediate and day-to-day control and supervision of Tyler Pipe. J.A. 57, 60-61, 89, 122-123; and see J.A. 94, 106, 109, 111-112.

[11]Ashe & Jones might do what it was "asked" (Wash. Br. 5; J.A. 90), but that would only be to preserve the relationship that generated commissions for Ashe & Jones. See J.A. 106, 109, 111.

[12]The statement of Washington that Tyler Pipe "directed, supervised, and instructed" Ashe & Jones (Wash. Br. 5) is directly contrary to

*(Footnote continued on following page)*

When the nature and extent of the activities of Ashe & Jones is analyzed, it is clear that the activities were principally for the benefit of Ashe & Jones and cannot be viewed as Tyler Pipe presence.

Apparently, the Washington legislature recognized the significance in the difference between an independent contractor and an employee. The B&O tax was imposed upon Ashe & Jones on the commissions it received from Tyler Pipe, but would not have been imposed upon wages paid to Tyler Pipe employees, if any had lived in Washington. R.C.W. § 82.04.360, p. A-1 below. The form and substance of the relationship has a substantial bearing on the tax at issue in this case.[13]

## II. WASHINGTON CANNOT IMPOSE ITS B&O TAX UPON TYLER PIPE, BECAUSE THE WASHINGTON B&O TAX (A) DISCRIMINATES AGAINST INTERSTATE COMMERCE, (B) IS NOT FAIRLY APPORTIONED, (C) IS NOT FAIRLY RELATED TO THE SERVICES PROVIDED BY THE STATE OF WASHINGTON, AND (D) LACKS A RATIONAL RELATIONSHIP BETWEEN THE INCOME OF TYLER PIPE THAT WASHINGTON SEEKS TO TAX AND THE INTRASTATE VALUES OF TYLER PIPE.

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all the evidence. See Tyler P. Br. 5-7. The job descriptions cited by Washington (J.A. 131-132, 134) refer to the direction, supervision and instruction of employee salesmen. Similarly, Washington's description of Ashe & Jones as Tyler Pipe's "agent" (Wash. Br. 5) distorts the evidence. J.A. 33-36, 153; and see J.A. 110.

[13]When a seller does not enter a state, but sells through local independent representatives, the state may tax the representatives' commissions based upon their local activities, but may not tax the seller whose goods were sold. *Ficklen v. Taxing District of Shelby County*, 145 U.S. 1 (1892); cf. *Robbins v. Taxing District of Shelby County*, 120 U.S. 489 (1887); and see *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 440 (1939).



### A. The B&O tax discriminates.

#### (1) Washington relies on sales and severance tax cases that do not apply to gross receipts taxes.

Washington asserts that the wholesaling element of its B&O tax is akin to a sales tax and the manufacturing element is akin to a severance tax. E.g., Wash. Br. 12, 20, 23, 27, 28, 31-32, 34, 35-36; and see Amici Nat'l Gov. Assn. et al. Br. 2, 23 and 25. The B&O tax, however, is distinguishable from a sales tax because the burden of the B&O tax does not fall on the Washington buyer, see n.8 above, and is distinguishable from a severance tax because it is not a tax on property ownership, see *Exxon Corp. v. Wisc. Dept. of Revenue*, 447 U.S. 207, 228 (1980). The B&O tax law itself explicitly states:

> It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

R.C.W. § 82.04.500, J.S., G-5; and see, *Norton, supra* at 537; *General Motors Corporation v. Washington*, 377 U.S. 375, 440 (1964).

#### (2) The B&O tax is not tax-neutral, because it encourages businesses to move to Washington.

The applicable constitutional test for non-discrimination is "tax neutral decision-making". That, the State of Washington acknowledges. Wash. Br. 23. Washington's assertion, however, that the B&O tax is neutral because an out-of-state seller pays exactly the same tax as a local seller is fallacious, because the local seller is exempt from the taxes of other states to which the out-of-state seller is subject. The B&O tax does not allow "tax neutral decision-making" because Tyler Pipe, by relocating part of its manufacturing operations to Washington, could reduce its

tax burden in the State of Texas without incurring additional Washington B&O tax.

**B. The B&O tax is not fairly apportioned.**

(1) The B&O tax does not reflect the fact that most of Tyler Pipe's selling activities and all of its manufacturing activities take place out-of-state.

The B&O Tax is not apportioned because it purports to tax an entire mining-manufacturing-sales business, but it fails to apportion the tax where one or more of those activities, mining and/or manufacturing, for example is performed out-of-state. Even if Washington were to tax each of the three elements performed in-state, the tax would not be fairly apportioned as to the sale element, because some—in Tyler Pipe's case the vast majority (Tyler P. Br. 4-5; p. 3-4, above)—of the post-manufacturing activities generating the gross receipts tax are performed out-of-state, and Washington makes no attempt to apportion that element of the tax. See *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434, 439-440 (1939). Washington's reliance on *Standard Pressed Steel* is misplaced because there all of the activities being taxed were performed in-state. See 419 U.S. at 564.

(2) Having imposed the B&O tax on the commissions paid to Ashe & Jones, Washington seeks to tax the same transaction twice.

A portion of Tyler Pipe's Washington gross receipts are paid to Ashe & Jones, and taxed by Washington, as commissions.[14] In view of the minimum level of activities of Tyler Pipe directly and through Ashe & Jones (p. 2-6, above), Washington has already taxed a sufficient portion of Tyler Pipe's gross receipts from its

[14]These commissions are subject to the Washington B&O Tax at a higher rate than would be applied to Tyler Pipe's total Washington gross receipts: 1.00 percent versus 0.44 percent, R.C.W. § 82.04.270 and 82.04.290, J.S. G-4 and G-5, or (in years subsequent to those involved in this case) 1.50 percent versus 0.484 percent, see pages E-6 and E-7 of the Jurisdictional Statement in *National Can Corp. v. Department of Revenue,* No. 85-2006.



Washington sales and has not shown why this de facto apportionment should be altered.

**C. The tax is not fairly related to the services allegedly received by Tyler Pipe, because Tyler Pipe received no services from Washington.**

Washington asserts that Tyler Pipe receives from the State of Washington (i) police protection, (ii) fire protection, (iii) availability of the courts and (iv) numerous other advantages of a civilized society. Wash. Br. p. 4.

Police protection is of no relevance to Tyler Pipe in the string of activities performed by Tyler Pipe to complete a sale. See p. 3-4, above. Protection of Ashe & Jones and its employees is not within the scope of Tyler Pipe's responsibility, a substantive difference between operating through a legitimate independent contractor and an employee.

Fire protection is of no relevance to Tyler Pipe because Tyler Pipe has no property in Washington.

The only occasion Tyler Pipe has used a court in Washington is in this case.

Tyler Pipe has no employees in Washington[15] to enjoy the numerous other advantages of Washington's civilized society.

If the B&O tax is held to be fairly related to the virtually nonexistent services that Washington asserts it provides to Tyler Pipe, in what case would the element of fair relation have any meaning? See *Armco, Inc. v. Hardesty,* 467 U.S. 638, 104 S. Ct. 2620, 2623, n. 6.

If the fair-relation-to-services test is nothing more than the nexus test, as Washington argues (Wash. Br. 13, 44), the fact that Tyler Pipe receives no Washington services for itself or its employees is further evidence of the want of nexus in this case.

[15]Washington does not even assert that Tyler Pipe enjoys "the benefit of a trained work force." *Exxon, supra* at 228.

### D. The B&O tax lacks rational relationship to the intrastate values of Tyler Pipe, because Tyler Pipe's values are located in Texas.

Virtually none of the value of Tyler Pipe's products is added in Washington, yet Washington, in assuming that there is minimal connection, essentially argues that nothing more is required in order for Washington to tax all of Tyler Pipe's gross receipts from Washington, Wash. Br. 43-44, thus arguing rational relationship out of the Due Process Clause requirement.

## III. WASHINGTON MAY NOT RAISE A NEW ARGUMENT NOW. EVEN IF TYLER PIPE WERE ONLY A SELLER, AND NOT ALSO A MANUFACTURER, THE B&O TAX IS UNCONSTITUTIONAL AS APPLIED TO TYLER PIPE BECAUSE WASHINGTON SEEKS TO MAKE TYLER PIPE BEAR THE FULL TAX BURDEN OF AN IN-STATE MANUFACTURER/SELLER.

Washington argues that Tyler Pipe can not raise the discrimination issue, because the products sold by Tyler Pipe were manufactured by Tyler Pipe's wholly-owned subsidiaries. Wash Br. 20-21, 37, n. 16.

The Washington Supreme Court refused to hear that argument, because Washington raised it for the first time in the appeal to that court. J.S. A-9. See, *Bass, Ratcliff & Gretton v. State Tax Commission,* 266 U.S. 271, 284-285 (1924).

At the trial, the parties, the witnesses and both counsel treated Tyler Pipe and its wholly-owned manufacturing subsidiaries as a unitary operation (e.g., J.A. 14, 46, 48, 52, 81, 83, 88, 94, 100, 106, 112, 114, 139), even though the State knew from the outset that the products at issue were manufactured by a subsidiary. J.A. 4, 17, 135, 139, 140.

Had Washington timely raised its argument, Tyler Pipe would have shown that the sale of products by the subsidiaries of Tyler



Pipe was strictly by book entries, that Ashe & Jones was in fact the representative of the manufacturing operation (Exhibit 41, J.A. 152), and that this would be an appropriate case to disregard the separate entities, as was in fact done at the trial.

## IV. THERE IS NO NEED FOR REMAND.

### A. Contrary to the assertion of Washington, Tyler Pipe has been advocating its position since before the Court's decision in *Armco.*

### B. Even if the *Armco* decision is to be applied prospectively only, Tyler Pipe is entitled to a tax refund inasmuch as Tyler Pipe pursued its arguments prior to *Armco.*

Contrary to what Washington states, Wash. Br. 45, n. 24, Tyler Pipe first raised constitutional questions at the administrative level on February 25, 1981, and briefed the discrimination issue, citing *Maryland v. Louisiana,* 451 U.S. 725 (1981), among other cases, before the trial court in November of 1983. The Court decided *Armco* on June 12, 1984.

Prospective application of the Court's ruling under these circumstances would frustrate the purposes of the Commerce Clause and of the Due Process Clause and would be especially inequitable to litigants, such as Tyler Pipe, who have pursued their constitutional rights at great cost and inconvenience prior to the alleged emergence of an "unforeshadowed" constitutional doctrine. *Chevron Oil Company v. Huson,* 404 U.S. 97, 106-107 (1971); and see *U.S. v. Johnson,* 457 U.S. 537, 562 (1982).

Washington does not assert the need for remand if the Court holds for Tyler Pipe on any of the nexus, apportionment, relation to services or rational relation issues.

### C. The so-called "credit" remedy enacted by Washington is meaningless.

Remand to consider the purported remedy to credit taxpayers for gross receipts taxes paid in other states is meaningless,

because, as Amici National Governors' Association, et. al. state (Amici Br. 2, 18), no other State currently imposes a gross receipts tax. Washington ignores the fact that the multiple tax burden borne by out-of-state sellers is often in the form of income and franchise taxes. The purported "remedy" is nothing more than an attempt to subject out-of-state sellers to needless protracted litigation and to deny them their tax refunds.

## CONCLUSION

**The State of Washington**

(i) cannot convert Tyler Pipe's catalog operation into local presence;

(ii) cannot mask the independent contractor question by misstating the issue;

(iii) cannot avoid the discrimination issue by isolating the State of Washington from the rest of the country;

(iv) cannot satisfy the apportionment requirement by taxing a minor portion of a sale the same as the whole sale;

(v) cannot tax Tyler Pipe for services it does not receive;

(vi) cannot raise new issues after the trial; and

(vii) cannot keep the taxes it has collected by enacting retroactive, hollow remedies.

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## APPENDIX

Revised Code of Washington:

82.04.360 Exemptions—Employees

This chapter shall not apply to any person in respect to his employment in the capacity of an employee or servant as distinguished from that of an independent contractor.